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Negotiation Exercises for Journal Article Publishing Contracts and Scholarly Monograph Publishing Contracts

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Negotiation Exercises for Journal Article Publishing Contracts and Scholarly Monograph Publishing Contracts

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This file contains the materials for two mock negotiations of scholarly publishing contracts. The first is for a journal article and the second is for a scholarly monograph. Both sets of materials include role sheets for two participants and a mock contract.

Each of these exercises can be conducted in about 45 minutes, including time to debrief. Most participants will benefit from an additional introductory presentation on negotiation techniques and copyright law as it pertains to scholarly publishing contracts. For an introduction to negotiation, I recommend *Getting to Yes: Negotiating Agreement Without Giving In*, by Roger Fisher, William Ury, and Bruce Patton.

If you intend to use the exercise yourself, take care that you do not view your negotiation partner's role sheet during the printing process. The role sheets contain secret facts that should only be seen by the person taking on that role.

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Printing Instructions

For the journal article exercise, print pages 2 and 3 of this document for the partner taking the role of Author. Print pages 4 and 5 for the partner taking the role of Editorial Board Member.

For the monograph exercise, print pages 6 to 8 of this document for the partner taking the role of Author. Print pages 6, 7, and 9 for the partner taking the role of Editor.

***Proceedings* Publication Agreement**

Society and Author agree as follows:

1. **Publication and Promotion:** In consideration of Society's agreement to publish the Work in *Proceedings*, Author hereby grants and assigns to Society the exclusive right to print, publish, reproduce, or distribute the Work throughout the world in all means of expression by any method now known or hereafter developed, including electronic format, and to market or sell the Work or any part of it as Society sees fit.

2. **Copyright:** Society will register the work's copyright in Author's name.

3. **Prior Publication and Attribution:** Author agrees not to publish the Work prior to publication of the Work by Society.

Twenty-four months after the publication date, Author may post the edited article (post-print), but not the final version, in Author's institutional repository and any not-for-profit repository. Author agrees to cite the original *Proceedings* publication when posting the post-print.

4. **Author Representations:** Author represents and warrants that:

- a) the Work is Author's original Work and Author has full power to enter into this Agreement;
- b) Author has obtained permission to publish any third-party material in the work; and
- c) the Work contains no material which is obscene, libelous, defamatory or previously published, in whole or in part.

Author shall indemnify and hold Society harmless against losses arising from breach of any such warranties.

[Signature block omitted.]

Author

Instructions: This sheet describes the role you will play during the negotiation exercise. Your negotiation partner has received some (not all) of this information as well as some additional information. It is up to you to decide what you reveal to your negotiation partner during the negotiation.

You are an assistant professor at University. You were hired four years ago and had a preliminary tenure review during your third year. The result of your review was satisfactory, with particular praise for your teaching. You were encouraged to be more aggressive about publishing your research in preparation for your tenure review, which will happen in your sixth year.

Six months ago, you submitted an article to *Proceedings*. *Proceedings* is one of several journals published by Society, the foremost organization of U.S. scholars in your field. It was your first choice for a place to publish this article.

Editorial Board Member has just notified you that *Proceedings* has accepted this article for publication. At the same time, Editorial Board Member shared *Proceedings*'s standard author publication agreement ("*Proceedings* Publication Agreement").

You don't want to spend your time negotiating this agreement, but you're not sure you should (or can) sign it as written. Here are some of your concerns:

- Your article contains some third-party images or figures for which you have not obtained permission. The material is key to your scholarship, and you believe that publishing it in the article would qualify as fair use. You tried a number of things in your efforts to identify the current copyright holder for this material, but you were unsuccessful.
- Your impetus for writing the article was a seminar you teach for graduate students each spring. You would like to be able to share it with future students in that course via your course website. You also think it would be good for your field if others were able use the article when teaching graduate students.
- University considers faculty scholarly works to be works made for hire under copyright law. It transfers copyright in those works back to their faculty authors, subject to several conditions. One of those conditions is that University can archive those works in its institutional repository. The faculty author determines whether and when University can provide public access to each work in the institutional repository.
- You would like to deposit at least your preprint of the article in University's institutional repository and make it accessible to the public. It's important to you that people have access to your scholarship even if they aren't affiliated with an institution that can afford a *Proceedings* subscription.
- You would like to post at least your preprint of the article on Website, a for-profit site that is popular with scholars in your discipline. You think posting the article there will raise the visibility of the article in a way that will be beneficial to your tenure review.

***Proceedings* Publication Agreement**

Society and Author agree as follows:

1. **Publication and Promotion:** In consideration of Society's agreement to publish the Work in *Proceedings*, Author hereby grants and assigns to Society the exclusive right to print, publish, reproduce, or distribute the Work throughout the world in all means of expression by any method now known or hereafter developed, including electronic format, and to market or sell the Work or any part of it as Society sees fit.

2. **Copyright:** Society will register the work's copyright in Author's name.

3. **Prior Publication and Attribution:** Author agrees not to publish the Work prior to publication of the Work by Society.

Twenty-four months after the publication date, Author may post the edited article (post-print), but not the final version, in Author's institutional repository and any not-for-profit repository. Author agrees to cite the original *Proceedings* publication when posting the post-print.

4. **Author Representations:** Author represents and warrants that:

- d) the Work is Author's original Work and Author has full power to enter into this Agreement;
- e) Author has obtained permission to publish any third-party material in the work; and
- f) the Work contains no material which is obscene, libelous, defamatory or previously published, in whole or in part.

Author shall indemnify and hold Society harmless against losses arising from breach of any such warranties.

[Signature block omitted.]

Editorial Board Member

Instructions: This sheet describes the role you will play during the negotiation exercise. Your negotiation partner has received some (not all) of this information as well as some additional information. It is up to you to decide what you reveal to your negotiation partner during the negotiation.

You are a member of the editorial board of *Proceedings*, one of several journals published by Society, a non-profit learned society in your field. Society has a contract with Publisher to publish the journal. Publisher manages copyediting, typesetting, and distribution. Society is trying to keep costs down, so the editorial board takes care of substantive editing and corresponds with authors.

You have just notified Author that their paper was accepted for publication in *Proceedings*. At the same time, you shared *Proceedings*'s standard author publication agreement ("*Proceedings* Publication Agreement").

In your role, you are authorized to negotiate the terms of the publication agreement with Author on behalf of Society. Here are some things to consider as you negotiate:

- The current president of Society needs to sign the agreement on behalf of the organization. If the contract is modified, she will review the changes carefully, but she doesn't like to second-guess the outcome of negotiations by members of the editorial board.
- Society's agreement with Publisher requires Society to indemnify Publisher for any liability resulting from publication of *Proceedings*. Society has included an indemnification clause in its standard author agreement to pass this liability on to authors. Society has a tight budget and would have a hard time paying to settle or defend against any legal challenge.
- You personally coordinated the blind peer review process for this article. It has taken six months.
- Although you were not one of the reviewers, you have read the article. You think it is an excellent contribution to your field and are excited for *Proceedings* to publish it.
- Over the past decade, the number of print subscriptions to *Proceedings* has dropped sharply, while the number of digital subscriptions has risen slightly.
- Society's agreement with Publisher provides that Publisher will charge a flat fee for publication of each issue of *Proceedings*, plus a variable fee based on the number of copies printed. Publisher takes those fees out of the subscription revenue it collects and sends the remainder of the revenue to Society. Society is still making a profit on *Proceedings*, but the profit decreases slightly with each issue.

Press Publication Agreement

Press and Author agree as follows:

1. **Publication and Promotion:** Upon approval from the Faculty Editorial Board of Press, and upon receipt of the final manuscript prepared according to the specifications in the Press Author's Manual, Press will publish and promote *Book*. Press will have responsibility for editing (including copyediting and proofreading), design, and production (including typesetting, printing, and binding).
2. **Assignment of Rights:** In consideration of Press's agreement to publish *Book*, Author hereby grants and assigns to Press the exclusive right to print, publish, reproduce, and distribute *Book* and any derivative works of *Book* throughout the world in all means of expression by any method now known or hereafter developed, including electronic format, and to market or sell *Book* or any part of it as Press sees fit. Press can sublicense any or all of these rights.
3. **Copyright:** Press will register *Book's* copyright in Author's name.
4. **Prior Publication:** Author agrees not to publish any part of *Book* prior to publication of *Book* by Press.
5. **Author Representations:** Author represents and warrants that:
 - a. *Book* is Author's original Work and Author has full power to enter into this Agreement;
 - b. Author has obtained permission to publish any third-party material in *Book*; and
 - c. *Book* contains no material which is obscene, libelous, defamatory or previously published, in whole or in part.

Author shall indemnify and hold Press harmless against losses arising from breach of any such warranties.

6. **Author's Copies and Discount.** Press will give Author 5 copies of the hardcover edition. Press agrees to sell to Author additional copies of *Book*, provided these are not for resale, at a discount of 40 percent from the list price.

7. **Royalties.** Press will pay Author royalties on net sales revenue according to the following terms:

- a. *On sales in the U.S. of the hardcover edition:* 5% on the first 500 copies sold; 8% on the sales of the 501st to 2000th copies sold; and 12% on any copies thereafter.
- b. *On sales in the U.S. of the paperback edition:* 4% on the first 500 copies sold; 6% on the sales of the 501st to 2000th copies sold; and 10% on any copies thereafter.
- c. On sales in the U.S. and all territories for which the Press holds rights of any digitized, audio-visual, or other non-book edition of *Book* (whether published alone,

simultaneous with, or subsequent to the first book edition): For all e-book formats, 20%, and for downloadable audio, 20%.

- d. A royalty rate for additional formats to be mutually agreed upon via an addendum to this contract will be produced at the time of the project's approval.
- e. *On sales of Book in any print edition sold outside the U.S.:* One-half of the royalty rate as defined in section 7(a) above.
- f. *On subsidiary rights:* Percentage of actual receipts as follows:
 - a. Licensing the manufacturing of a co-publication, hardcover, paperback and large-print edition: 50%
 - b. Licensing a translation: 50%
 - c. Granting permission for the authorized reproduction and quotation of excerpts of material in *Book*: 50%
 - d. Licensing distribution in digitized or other media: 50%
 - e. Serializing before or after publication: 50%
 - f. Licensing dramatizations and performances: 75%
 - g. Licensing motion picture, radio, and television rights: 75%
- g. *Statements and Payments.* The Press agrees to render annual royalty statements on a calendar basis (January 1 to December 31). The statements will be mailed, or made available electronically, no later than March 31. Payments will be mailed under separate cover by March 31. If at the end of the year Press owes less than fifty dollars, payment shall be deferred until the next period, unless it is a final statement or payment.

8. Reversion: If *Book* is out of print and Publisher receives from Author a written request for a reversion of rights to *Book*, Publisher shall within six months (i) announce that it will reissue an edition of *Book* or (ii) revert in writing to Author the rights to *Book* granted to Publisher in this Agreement.

9. Delivery of Manuscript: Author will prepare the manuscript according to the specifications in the Press Author's Manual and deliver to the Press on or before September 1, 2018 one copy of a complete, legible manuscript of the Work.

10. Future Works: Author gives Press an exclusive option to publish Author's next book. Press will have 30 days to review the Author's next proposal, during which Author will not submit the proposal to other publishers. If Press chooses to exercise its option, it will provide Author with an offer. Press and Author may negotiate the offer. Author is free to decline the offer.

[Signature block omitted.]

Author

Instructions: This sheet describes the role you will play during the negotiation exercise. Your negotiation partner has received some (not all) of this information as well as some additional information. It is up to you to decide what you reveal to your negotiation partner during the negotiation.

You are an assistant professor at University. You were hired four years ago and had a preliminary tenure review during your third year. The result of your review was satisfactory, with particular praise for your teaching. You were encouraged to be more aggressive about publishing your research in preparation for your tenure review, which will happen in your sixth year.

Six months ago, you submitted a book proposal to Editor, who works at Press, a non-profit university press run by Institute. Press publishes in many fields, including yours. It was your first choice for a place to publish *Book*. Editor has just notified you that peer review of your full-draft manuscript is complete and Press has accepted *Book* for publication. At the same time, Editor shared Press's standard author publication agreement ("Press Publication Agreement").

You don't want to spend very much time negotiating this agreement, but you're not sure you should (or can) sign it as written. Here are some of your concerns:

- You are teaching this summer and will have limited time to work on revisions. You don't want to commit to delivering the manuscript before November 1.
- Your book contains three images or figures you did not create, for which you have not obtained permission. The items are key to your scholarship, and you believe that publishing them in the book would qualify as fair use. You tried to identify their current copyright holders, but you were unsuccessful.
- Two of the book's twelve chapters are based on your dissertation. They have been heavily revised. Your dissertation is available from ProQuest and in the online institutional repository of the school that granted your doctorate.
- Your impetus for writing one part of the book (four out of the book's twelve chapters) was a seminar you teach for graduate students each spring. You would like to be able to share those at least those four chapters with future students in that course via Canvas. You also think it would be good for your field if others were able use those chapters when teaching graduate students.
- University considers faculty scholarly works to be works made for hire under copyright law. It transfers copyright in those works back to their faculty authors, subject to several conditions. One of those conditions is that University can archive those works in its institutional repository. The faculty author determines whether and when University can provide public access to each work in the institutional repository. You would like to make that archived copy accessible to the public. It's important to you that people have access to your scholarship even if they aren't affiliated with an institution that can afford to buy a copy of your book.

Editor

Instructions: This sheet describes the role you will play during the negotiation exercise. Your negotiation partner has received some (not all) of this information as well as some additional information. It is up to you to decide what you reveal to your negotiation partner during the negotiation.

You are an editor at Press, a non-profit university press run by Institute. Press publishes in many fields, including Author's. It primarily publishes scholarly monographs, written by scholars for their peers, as well as some general interest titles. Press handles project management, book design, copyediting, typesetting, printing, distribution, marketing, and digital archiving of the books it publishes.

Six months ago, you received a book proposal from Author, for *Book*, a scholarly monograph. At this point, Author's full-draft manuscript has been peer-reviewed by two people. You have just contacted Author to offer to publish *Book*. At the same time, you shared Press's standard author publication agreement ("Press Publication Agreement").

In your role, you are authorized to negotiate the terms of the publication agreement with Author on behalf of Press. Here are some things to consider as you negotiate:

- Press's default contract has been approved by the current director of Press and Institute's Office of General Counsel. If the contract is modified, they will have to approve the changes.
- In some cases, Press has modified the standard contract to permit authors to rely on fair use to include third-party material, so long as the author indemnifies Press and Press agrees that the use is likely fair.
- You personally coordinated the blind peer review process for this book. It has taken six months.
- You have also read the book yourself. You think it is an excellent contribution to the field and are excited for Press to publish it.
- The delivery date in the proposed agreement (September 1) is intentionally cautious. In your experience, authors rarely deliver final manuscripts on time. Press needs a final manuscript by December 1 in order to stay on track with its internal schedule. If that deadline is missed, you can reshuffle things, but it will impact other Press projects.
- Most of Press's sales of scholarly monographs are to libraries. Those sales take place primarily during the first three years after publication. In a few cases, Press has modified its default contract to permit authors to post public copies of their monographs after that three-year period is over. Press has typically covered its costs by that point.
- Press has a mandate from Institute to make scholarly knowledge widely available at low cost, while keeping its budget balanced.